UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

BUILDING CONTRACTORS ASSOCIATION, INC.,	:	
	:	Case No. 02-RC-154031
Employer,	:	
	:	
-and-	:	
	:	
THE DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,	:	
	:	
Petitioner.	:	

BUILDING CONTRACTORS ASSOCIATION, INC.'S REQUEST FOR REVIEW AND SUPPORTING BRIEF

Frederick D. Braid
Howard Sokol
Edward C. Frischling
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, New York 10019
(212) 513-3200 (phone)
(212) 385-9010 (fax)
fred.braid@hklaw.com
howard.sokol@hklaw.com
edward.frischling@hklaw.com

Attorneys for Building Contractors Association, Inc.

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REQUEST FOR REVIEW

The Building Contractors Association, Inc. ("BCA"), incorrectly designated as the Employer in this matter,[1] respectfully submits this Request for Review ("Request") of the Regional Director's Decision and Direction of Election ("Decision")[2] pursuant to Section 102.67 of the Rules and Regulations ("Rules") of the National Labor Relations Board ("NLRB" or "Board"). The Board should grant this Request in its entirety and dismiss the Petition[3] and void the Election[4] because (1) substantial questions of law or policy are raised by the absence of and/or departure from Board precedent; (2) the Decision is clearly erroneous on substantial factual issues and prejudicially affects the rights of the BCA and its members; (3) a ruling made in connection with the Hearing has resulted in prejudicial error; and/or (4) there are compelling reasons for reconsideration of an important Board rule or policy.

SUMMARY OF ARGUMENT

The Decision's determination that an existing Section 8(f) multiemployer bargaining unit supports a Section 9(a) Election and conversion of the 8(f) relationships of all employer members of the bargaining unit to multiemployer 9(a) relationship is without Board precedent and contrary

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[1] The BCA employs no employees who are the subject of the Petition.

[2] Unless otherwise indicated, the term Decision refers to both the Regional Director's July 30, 2015 Decision and Direction of Election ("Initial Decision") and the December 2, 2015 Supplemental Decision and Direction of Election ("Supplemental Decision").

[3] The Petition refers to the "RC Petition" filed on June 11, 2015 by the Petitioner (also referred to herein as "Union" or "Carpenters") which sought a representation election among the employees of the approximately 175 members-employers of the BCA, a multiemployer construction industry trade association. Only about 145 of the BCA's members affirmatively designated the BCA to bargain on their behalf with the Union during the round of contract negotiations immediately preceding the Election ("Designating Contractors"). BCA Ex. 3. Exhibits for the Hearing will be referenced as "Jt. Ex. __" and "BCA Ex. __," respectively, for Joint and BCA exhibits.

[4] The Election refers to the mail ballot election, the tally of which was conducted at Region 2 on January 6, 2016, in which the Union prevailed, with only about 25% of the distributed ballots returned and counted. The unit was comprised of 3,269 eligible voters, of whom only 813 cast ballots. Tally of Ballots, issued by Region 2 on January 6, 2016.

to the fundamental principles authorizing 8(f) pre-hire agreements under the National Labor Relations Act ("Act"). The attempt to bootstrap the voluntary and longstanding 8(f) multiemployer relationship between the BCA and the Carpenters into the unequivocal consent necessary for converting that relationship into a multiemployer 9(a) relationship is not only without precedent, but it is also inherently destructive of the Section 7 rights of all affected employees. The Regional Director's Decision is incompatible with the most fundamental underpinnings of the Act and must be reversed.

In addition, the Decision improperly includes supervisors—Carpenter Foremen and Carpenter General Foremen[5]—in the unit, as well as 16 Designating Contractors who employed no carpenters during the *Daniel-Steiny* eligibility period for representation elections in the construction industry.[6] The Decision's inclusion of Foremen and General Foremen in the unit is based upon the Regional Director's erroneous finding on a substantial factual issue that prejudicially affects the rights of the BCA, its members, and the employees of its Designating Contractors. The Decision's inclusion in the unit of the 16 Designating Contractors who did not even employ carpenters eligible to vote turns the law of pre-hire agreements on its head. Thus, construction employers who indisputably are limited to establishing 8(f) relationships and entering into Section 8(f) agreements when they have no employees are now forced by the Decision into 9(a) relationships that violate the Act. In reaching this inexplicable result, the Regional Director refused to receive or ignored evidence concerning the employment history of the 16 Designating Contractors who did not employ any eligible voters in the *Daniel-Steiny* period. The ruling to preclude consideration of such evidence resulted in prejudicial error.

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[5] These two distinct job positions are described in the collective bargaining agreement as supervisory positions. The 453 employees in these positions comprise about 14% of the unit determined to be appropriate by the Regional Director. Foremen supervise carpenters, and General Foremen supervise Foremen. Jt. Ex. 2, Article VI.

[6] BCA Ex. 17 (rejected). *See also* n.24, *infra.*

The Petition sought a representation election in a longstanding Section 8(f) multiemployer unit comprised of approximately 145 Designating Contractors in the midst of collective bargaining for a renewal of the Section 8(f) agreement. The petitioned-for multiemployer unit is not an appropriate unit because (i) there is no unequivocal consent or clear intention by any, let alone every, Designating Contractor to proceed to an election in a multiemployer unit or to enter into a Section 9(a) bargaining relationship with the Union; (ii) it deprives the employees of the Designating Contractors their guaranteed rights under Section 7 of the Act to freely choose their bargaining representative; (iii) it includes Designating Contractors who have not employed any employees who meet the construction industry voting eligibility requirements of the *Daniel-Steiny* formula; and (iv) nearly 500 supervisory employees of the Designating Contractors, *i.e.,* Carpenter General Foremen and Carpenter Foremen, have improperly been included in the unit.

The Decision (a) misconstrues inapplicable precedent in an effort to fill the void created by the absence of Board precedent squarely on point, (b) recites irrelevant, undisputed labor principles and relies upon inapposite authority, (c) ignores uncontroverted testimony and undervalues or ignores significant record evidence relevant to the issues, (d) disregards the Section 7 rights of employees, (e) conflates facts with legal requirements, and (f) mischaracterizes positions of and concessions by the BCA. The Board should, therefore, grant this Request, dismiss the Petition, and void the Election.

FACTS

The BCA is a multiemployer trade association with approximately 175 members, construction industry companies operating in New York City and its surrounding areas. Tr. 43:10-

44:1, 45:21-23.[7] The BCA performs a variety of services for its members,[8] including negotiating and administering about 13 collective bargaining agreements on behalf of those members who authorize the BCA to represent them with respect to the respective unions. *See* BCA Ex. 6. Of the 13 collective bargaining relationships the BCA has, only three of them are Section 9(a) relationships.[9] The remaining 10 relationships, including its relationship pre-Election with the Carpenters, are Section 8(f) relationships. Tr. 47:3-6, 70:18-71:9.

For more than 30 years, the BCA and the Carpenters have been signatories to many successive Section 8(f) pre-hire agreements, including the current agreement, extending the most recent agreement for one year, from its expiration on June 30, 2015, to June 30, 2016. Jt. Ex. 1, Tr. 8:19-9:24. Until 2012, when the BCA duly amended its bylaws, the BCA was an "all-in" association, meaning that membership bound contractors to all of the BCA's agreements and authorized the BCA to negotiate on their behalf for all agreements. Tr. 47:3-9. Since the 2012 amendments, a member need only designate the BCA as their bargaining agent for the Mason Tenders District Council and the General Building Laborers Local 66, both of which have Section 9(a) relationships and agreements with the BCA. As to the remaining 11 unions, the members are free to pick and choose which, if any, they will authorize the BCA to represent them with.[10] There

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[7] Citations to the transcript of the Hearing (occurring on July 9, July 14, October 21, October 26, and November 2, collectively, the "Hearing") are referenced in this Request as "Tr. _____."

[8] Among the services the BCA provides for its members are negotiating and administering collective bargaining agreements, providing health insurance options, lobbying state and local politicians, directing a political action committee, participating in industry meetings, apprising members of industry events and developments, and updating members on activities and changes at relevant state and local administrative offices and agencies. Tr. 43:15-21.

[9] Mason Tenders District Council, General Building Laborers Local 66, and Bricklayers Local 1. These 9(a) relationships have existed for at least 50 years. Tr. 70:21-71:5, 99:4-10.

[10] In the most recent round of bargaining with the Carpenters, 25 members withdrew their bargaining authority from the BCA and terminated their 8(f) agreements with the Carpenters. BCA Ex. 10(b) (last page: one-page chart), Tr. 207:20-25.

were documents from the BCA that accompanied the vote on the amended bylaws, including one that explained the differences between Section 9(a) and 8(f) agreements. BCA Ex. 2(a).

In February 2015, before commencement of the last round of negotiations with the Carpenters, the BCA established separate labor committees, comprised of stakeholders, to represent the BCA with respect to each union it was authorized to deal with on behalf of those members who provided bargaining designations for the respective unions. On June 25, 2015, several days before the June 30 expiration of the previous collective bargaining agreement, the BCA and the Carpenters executed a one year extension, until June 30, 2016, of this Section 8(f) agreement. Forty-nine of the 145 Designating Contractors had no carpenters on their respective payrolls at this time.[11]

There is no evidence that, for at least the past 43 years, there has ever been a conversion of an 8(f) multiemployer relationship to one of a 9(a) multiemployer relationship between the BCA and any of the unions with which it has negotiated collective bargaining agreements. Tr. 99:4-10. During the last round of negotiations with the Carpenters for the agreement that expired in 2015, the Carpenters made a proposal to the BCA that, if accepted, would have converted the existing 8(f) relationship to one of 9(a), but the BCA rejected the proposal. The BCA, in turn, through its designated labor committee, made a proposal to the Carpenters in its most recent negotiations with the Carpenters for the one-year extension to June 30, 2016 that, if accepted, would have converted the existing 8(f) relationship to one of 9(a), upon the ultimate approval by the BCA's entire membership. The Carpenters rejected the proposal.

Additional facts appear throughout the Argument.

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[11] *See* n.28, *infra*.

ARGUMENT

I

THE PETITIONED-FOR MULTIEMPLOYER UNIT IS NOT APPROPRIATE BECAUSE THE DESIGNATING CONTRACTORS NEITHER PROVIDED THE REQUIRED CONSENT NOR OTHERWISE INTENDED TO BE BOUND TO SECTION 9(A) MULTIEMPLOYER BARGAINING

A. The Applicable Requirement: Unequivocal Consent *not* Intent

The Petition should be dismissed because there was no unequivocal *consent* or, for that matter, an expression of an unequivocal *intention* by any, let alone every one, of the Designating Contractors to proceed to an election in a multiemployer unit or to enter into a Section 9(a) bargaining relationship with the Carpenters.

For more than 40 years, it has been well-established that the unequivocal *consent* (a higher standard than *intent*) of all parties is required to convene a Board-certified election, such as the Election, covering employees of different employers in a multiemployer bargaining unit. *See, e.g., Oakwood Care Center*, 343 NLRB 659 (2004) (reaffirming "the *fundamental principle* that Section 9(b) permits the Board to find multiemployer units appropriate only with the *consent of the parties*") (*id.* at 660, 662, 663 n.25, emphasis added); *Lee Hospital*, 300 NLRB 947 (1990) (explaining "the Board does not include employees in the same unit if they do not have the same employer, absent *employer consent*") (*id.* at 948 n.12, emphasis added); *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973) (stating "there is no legal basis for establishing a multiemployer unit absent a showing . . . that [all the employers] have by an established course of conduct *unequivocally manifested a desire* to be bound in *future* collective bargaining by group rather than individual

action") (emphasis added). In each of the foregoing cases, the Board stated that unequivocal consent is required by all parties in order to establish a valid multiemployer bargaining unit.[12]

The Regional Director ignores all of these cases in her analysis (Initial Decision at 6-7) and instead relies only on cases that purport to require only unequivocal *intent* by employers to participate in and be bound by multiemployer bargaining. *Id.* at 6, *citing Arbor Construction Personnel, Inc.*, 343 NLRB 257, 257 (2004); *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991); *Sands Point Nursing Home*, 319 NLRB 390, 390 (1995). Although avoidance of what would appear to be persuasive authority is not explained, the Regional Director apparently wanted to rely upon a less rigorous "intent" standard to sustain a finding of the appropriateness of a Section 9(a) multiemployer bargaining unit, or perhaps the Regional Director meant for "consent" and "intent" to be used and considered interchangeably. In any event, the record evidence demonstrates a lack of both unequivocal intent, as well as a lack of unequivocal consent, by any of the Designating Contractors.

B. The Facts and Events: Neither Unequivocal Consent *nor* Intent

The Designating Contractors provided neither unequivocal consent nor clear intent to be bound to Section 9(a) multiemployer bargaining with the Union. In fact, *Arbor Construction* actually supports the BCA's position. In *Arbor Construction*, the Board found that the petitioned-for single unit was not appropriate only after finding that there was a controlling multiemployer bargaining history, and where it was agreed by the parties that Section 9(a) governed the relationship between the multiemployer association and the intervening union. 343 NLRB at 258.

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[12] Although the cases are factually distinguishable from one another as well as from the present case, the legal principles involved are equally applicable to this matter. In fact, at least one of the cases relied upon by the Regional Director, *Hunts Point,* 301 NLRB at 753, cites to *Greenhoot* for support. There is absolutely no basis in this record to support the Decision's conclusion that the Designating Contractors unequivocally consented to Section 9(a) multiemployer bargaining.

Thus, key dispositive facts in *Arbor Construction* are clearly absent from this case, and *Arbor Construction* is easily distinguishable because no Section 9(a) bargaining relationship ever existed between the BCA and the Union in this case. Accordingly, the Regional Director's reliance on *Arbor Construction* is misplaced. In fact, given the underpinning of *Arbor Construction* on the finding of a pre-existing Section 9(a) relationship, the implication is clear that where, as here, there is a pre-existing 8(f) relationship, single-employer units are appropriate, and a multiemployer 9(a) unit is not appropriate.

Another case relied upon by the Regional Director, *Sands Point*, explained that the burden is on the party seeking the multiemployer unit to "demonstrate a controlling history of bargaining on a multiemployer basis and an unequivocal intent by the employer to participate in and be bound by the results of group bargaining." 319 NLRB at 390 (*citing Hunts Point*, 301 NLRB at 752). In the present case, however, the Regional Director erroneously focuses almost exclusively on the multiemployer Section 8(f) bargaining history as evidence to buttress her conclusion that there was an unequivocal intent by the Designating Contractors to engage in 9(a) multiemployer bargaining. Initial Decision at 6-8. However, it is manifestly obvious, or should be, that the dramatic differences in the rights of the parties in 8(f) and 9(a) relationships cannot possibly provide a reliable basis for concluding or, more appropriately, assuming that the existence of a longstanding 8(f) bargaining relationship evidences intent to be bound in a 9(a) relationship with wholly different legal rights and obligations. Nor should it when it is the Section 7 rights of the employees that are at stake.

Hunts Point, also relied upon by the Regional Director, is likewise distinguishable. There, the Board, in disagreeing that an industrywide unit was appropriate, actually found that the

"evidence falls short of a demonstration of an unequivocal intent to be bound by the actions of a" multiemployer bargaining group. 301 NLRB 752.

Lastly, for good measure, the Regional Director finds that the BCA's "claim that [the Designating Contractors] have the choice of whether to allow an 8(f) agreement to become a 9(a) relationship . . . is contradicted by its own documents and Board law." Initial Decision at 8. As demonstrated immediately below, the Regional Director's reasoning is faulty and the conclusions in the Initial Decision are erroneous.

1. The BCA's Testimony was Clear and Uncontroverted in Demonstrating the Designating Contractors neither Unequivocally Consented nor Intended to be Bound to a Section (9)(a) Multiemployer Relationship or Agreement

John O'Hare ("O'Hare"), the BCA's Assistant Managing Director for the past 17 years (Tr. 43:7-14), testified that only three of the BCA's 13 collective bargaining relationships are Section 9(a) relationships. The remaining 10 are all 8(f) relationships and agreements. He stated that there has never ever been a conversion of an 8(f) relationship to one of 9(a) between the BCA and any of the unions with which it has negotiated collective bargaining agreements, for at least the past 43 years. Tr. 99:4-10. O'Hare then explained that the members of the BCA said to him "that they did not want to have the agreement to be a 9A, to do everything we can to avoid it. They weren't happy with the negotiation issues that we had on the 9A." Tr. 57:5-8. To this end, O'Hare testified,

> Even going by the proposal that was made to the Carpenters the last session [referring to June 2015] regarding the 8F/9A issue. We would bring that back to our entire membership because we have found since that there's been a lot of pushback in the proposal.

Tr. 94:13-17. During the negotiations between the BCA and Carpenters for the 2011 to 2015 agreement (Jt. Ex. 2), O'Hare testified that the BCA rejected a proposal by the Carpenters to convert the agreement from 8(f) to 9(a). Tr. 134:16-22. And, although the BCA, during those

same negotiations, made a counterproposal in January 2013, it later withdrew that proposal because there was too much "resistance from our membership . . . to a 9A knowing that it was going to be an obstacle for them in the future." Tr. 190:6-12.

O'Hare's testimony, all of which remained uncontroverted and unimpeached on this point, commands the sole conclusion that the Designating Contractors neither consented to nor intended to make a fundamental change in their 8(f) relationship with the Carpenters. In fact, conversion of the relationship from 8(f) to 9(a) was specifically rejected, in 2013 by the BCA's negotiating committee and in 2015 by the Carpenters negotiating committee, and never approved by the BCA's membership. Moreover, even if the BCA and the Union were in agreement to establish a multiemployer 9(a) relationship, they could not do so without first having separate elections among the employees of Designating Contractors in single-employer units.[13] Accordingly, the petitioned-for unit is not an appropriate unit.

2. The BCA's Longstanding Section 8(f) Bargaining History with the Union Cannot Alone Demonstrate the Designating Contractors' Unequivocal Consent or Intention to be Bound to a Section 9(a) Multiemployer Bargaining Relationship

As discussed above, even the authority relied upon by the Regional Director, requiring only unequivocal "intent" (as opposed to the higher standard of unequivocal "consent"), demands a two-step process for binding employers to multiemployer bargaining. First, there must be an established history of multiemployer bargaining and, second, and separately, there must be evidence of the employer's intent to then be bound by the group bargaining. *Sands Point*, 319 NLRB at 390 (*citing Hunts Point*, 301 NLRB at 752) (other citations omitted). It should go without saying that it would defeat the purpose of a two-step analysis to conclude that satisfaction of the first step automatically satisfies the second step. Yet, this is precisely what the Regional Director

[13] *See* Argument II, *infra*.

appears to have done. The Decision uses the voluntary, consensual 8(f) multiemployer relationship between the Carpenters and the BCA as evidence that the Designating Contractors intended to be bound to 9(a) agreements and a 9(a) multiemployer relationship. This is not only illogical, but also devoid of any factual or legal basis. The Initial Decision is completely bereft (Initial Decision at 6-8) of any authority that suggests, let alone commands, the conclusion reached by the Regional Director that a history of Section 8(f) multiemployer bargaining is sufficient, alone, to demonstrate that those employers unequivocally consented or intended to be bound by Section 9(a) multiemployer bargaining.[14] And, even if it could, allowing the employers and the Union to convert their relationship would deprive the employees of their respective Designating Contractors of their Section 7 rights to self-determination on the issue of unionization. As discussed in Argument II, *infra*, the rights of the employees of each Designating Contractor would be subordinated to the collective view of the multiemployer unit, making it possible, for example, for the employees of a Designating Contractor who unanimously reject unionization to nonetheless be forced into a 9(a) relationship by the employees of other employers.

The destructive effect of such a result on Section 7 rights is self-evident. Section 8(f) provides an exception to Section 9(a), allowing recognition in the construction industry in the absence of demonstrated majority support for a union. For that reason, employers are free to repudiate an 8(f) agreement at its expiration and to refuse to bargain with the union in the absence

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[14] In *Cent. Transp., Inc.*, 328 NLRB 407 (1999), for example, cited by the Regional Director (Initial Decision at 7), the issue confronting the Board had nothing to do with a significant change in the multiemployer bargaining relationship, *i.e.*, conversion from Section 8(f) to Section 9(a) bargaining, but only whether the petitioned-for single unit was appropriate. *Id.* at 408-09. In fact, in *Central Transport,* just as in *Sands Point,* 319 NLRB at 390-91, the respective employers argued *for* a multiemployer unit and *against* the petitioned-for single employer unit. None of the issues in this case were present in those cases. Moreover, and mitigating against the relevance of cases such as *Central Transport,* the various BCA documents, including its bylaws and designation forms, make it clear which members are "in" and which are "out" with respect to designating their respective bargaining rights to the BCA, for each of the 13 unions with which the BCA negotiates collective bargaining agreements, and for what type of bargaining, *i.e.*, Section 8(f) or 9(a).

of its having established majority support.[15] Taking a bargaining relationship concededly not based on evidence of majority support and using it to impute majority support for a 9(a) relationship eviscerates the Section 7 rights of the employees involved and is fundamentally at odds with the purposes of the Act. Obviously, therefore, Section 8(f) multiemployer bargaining history cannot serve as the basis to establish consent or, for that matter, intent, of the Designating Contractors to Section 9(a) multiemployer bargaining in that same unit.[16]

As previously noted, there is no precedent supporting the Decision to convert an 8(f) multiemployer bargaining relationship to a 9(a) multiemployer bargaining relationship. The Regional Director's attempts to compensate for that deficit fall woefully short of the mark and are strikingly in derogation of the Section 7 rights of the employees who will be affected by the Decision. Citations to authority (Initial Decision at 8) for propositions over which there is no dispute between the Parties, for example, concerning the "craft" of the carpenters,[17] and for which the authority is inapposite (Initial Decision at 8-9), for example, regarding unequivocal consent emanating from an 8(f) relationship,[18] are red herrings that have no bearing on the clear facts or the relevant issues in this case. Accordingly, the analysis and determinations are of little to no

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[15] *John Deklewa & Sons,* 282 NLRB 1375, 1385 (1987), *enf'd sub. nom., Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert denied,* 488 U.S. 889 (1988).

[16] It is wholly inconsistent with the distinctions between 8(f) and 9(a) relationships, whereupon at the expiration of a Section 8(f) agreement, the signatory union "acquires no other rights and privileges of a 9(a) exclusive representative [and] enjoys no presumption of majority status . . . and cannot . . . require bargaining for a successor agreement" (*Deklewa,* 282 NLRB at 1387), that such same union might acquire the "privilege" of using a Section 8(f) bargaining history to establish "unequivocal intent" for Section 9(a) multiemployer bargaining with a continuing presumption of majority status that never existed.

[17] The BCA does not take issue with the craft of the individuals, but does maintain that Carpenter Foremen and Carpenter General Foremen are ineligible for inclusion in the unit because of their supervisory status. *See* Argument IV, *infra.*

[18] In *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988), the Board considered the parties' bargaining history to resolve the geographic scope of a single employer's bargaining unit and the dispute between two unions concerning whether two groups of employees should be included in one or separate units. In *Alley Drywall, Inc.*, 333 NLRB 1005 (2001), the Board held that the Section 8(f) bargaining history was not controlling in determining an appropriate unit, and it ultimately declined to defer to it. *Id.* at 1008.

value with respect to the significantly distinct and unique issues before the Board here. Plainly, none of the Regional Director's cited authority concern (i) a petitioned-for multiemployer bargaining unit, let alone (ii) one in which the Board deferred to the Section 8(f) multiemployer bargaining history to determine the propriety of converting such relationship to Section 9(a) multiemployer bargaining, and through the reasoning that (iii) the Section 8(f) multiemployer bargaining history, itself, demonstrated an unequivocal intent or consent to be bound to Section 9(a) multiemployer bargaining. Pointedly, the Regional Director does not rely upon any controlling authority in the Initial Decision to support the proposition, let alone definitively conclude, that a Section 8(f) multiemployer bargaining history constitutes unequivocal intent or consent to be bound to Section 9(a) multiemployer bargaining.[19]

3. The BCA's Bylaws and Other Membership-Related Documents do not Demonstrate the Designating Contractors' Unequivocal Consent or Intention to be Bound to Section 9(a) Multiemployer Bargaining

In reaching the conclusion that the Designating Contractors unequivocally intended to be bound to Section 9(a) multiemployer bargaining, the Regional Director repeatedly looked to the BCA's Bylaws and other documents, including and especially its Designation of Bargaining Rights.[20] Initial Decision at 6-7. Specifically, the Regional Director reasoned,

> the designation forms, along with all the other membership materials including the application forms, do not make any distinction or limit the [BCA's] authority based on whether the contract is an 8(f) and 9(a) agreement. Similarly, under the [BCA's]

[19] In an apparent attempt to compensate for the Decision's legal deficiencies, there are a number of inaccuracies recited in the "Background Facts," including self-serving, unwarranted and insupportable deductions and suppositions (Initial Decision at 2-5), as revealed throughout this brief in discussions of the actual relevant facts based upon the record.

[20] BCA Ex. 6. The Regional Director focuses (Initial Decision at 3, 7-8) upon the language on the bottom of the form, "the designation authorizes the BCA to negotiate and agree to terms of collective bargaining agreements with each of the labor organizations designated above and to bind you with respect to its actions on your behalf." There is no basis for concluding that this language authorizes anything other than negotiating renewal agreements that maintain the existing relationships with the respective unions, 9(a) for those who have such relationships, and 8(f) for those that are pre-hire relationships. At best, the language could be argued to be ambiguous, but never could it fairly be read as expressing "unequivocal consent" or "intent" to convert an 8(f) multiemployer relationship to a 9(a) multiemployer relationship.

> by-laws, the Labor Relations Committee is authorized to act on behalf of the member-employers for all dealings with the unions selected via the designation forms and does not differentiate between 8(f) and 9(a) agreements.

Id. at 7. The undisputed reality is that for at least the past 30 years, the BCA's relationship with the Carpenters has been a Section 8(f) multiemployer relationship with successive 8(f) multiemployer pre-hire collective bargaining agreements. The Designating Contractors would have no reason to contemplate any change in that relationship, especially since at the time they provided their authorizations and for the months following until shortly before their agreements with the Carpenters were expiring on June 30, 2015, there was not even a question raised that the relationship might change. The absence of any distinctions in the Bylaws, Designation of Bargaining Rights, or any other membership-related documents between 8(f) and 9(a) cannot be equated with an expression of "unequivocal consent" or even an "intent," as well as a grant of unlimited authority to the BCA by the Designating Contractors to convert their 8(f) multiemployer relationship to a 9(a) multiemployer relationship. This is clear from the unambiguous and uncontroverted testimony of O'Hare.[21]

The Regional Director's reasoning in this regard is overly narrow, misapprehends the purpose and scope of the documents, and, essentially, puts the burden on the BCA to disprove "unequivocal consent" or "intent" in light of the, at best, ambiguous language. It is obvious, at least to the BCA, and consistent with such documents in a variety of organizations, that the BCA's Bylaws serve only to set forth a general framework within which to operate. As even a cursory review of the Bylaws reveals, references to 8(f) and 9(a) would be as out of place as would citations

[21] Specifically, the BCA knew its limitations as to its authorization to bargain and, concomitantly, the Designating Contractors knew their rights in connection with their designations of the BCA. As O'Hare testified, the BCA would have been required to "bring [a 9(a) agreement with the Carpenters] back to our entire membership because we have found since then [*i.e.*, June 2015] that there's been a lot of pushback in the [June 2015 9(a)] proposal." Tr. 94:13-17. O'Hare also detailed the BCA rejection of a proposal by the Carpenters to convert the agreement from 8(f) to 9(a) during the negotiations for the 2011-15 agreement (Jt. Ex. 2). Tr. 134:16-22.

to cases referencing those statutory provisions. Nonetheless, and conceding *arguendo* that the absence of references to 8(f) or 9(a) might be construed as permitting the negotiation of both types of agreements, as the BCA has done over many years, it is a giant, unwarranted leap from there to conclude that the absence of those references authorizes the BCA to convert its existing relationships to new ones with significant legal consequences. As for the Regional Director's reasoning that "evidence of intent to be bound to the multi-employer agreement is also established because member-employers are not allowed to either approve or reject the final negotiated agreement between the [BCA] and the Petitioner" (Initial Decision at 7), such reasoning is neither factually supported nor persuasive. Again, with respect to the Carpenters, and the first-ever potential change in a legal relationship in at least 43 years with respect to a union with which the BCA has had a bargaining history, the BCA's "entire membership" would have had to approve. Further, whether or not the BCA's member-employers have the opportunity to approve or reject the *final* negotiated agreement between the BCA and any particular union does not shed any light, let alone legal weight, as to a demonstration of either "unequivocal consent" or "intent" by the BCA members, including the Designating Contractors, to convert their existing 8(f) multiemployer relationships to 9(a) multiemployer relationships with any union, including the Carpenters. No such intent or consent was provided by the Designating Contractors, and the petitioned-for unit is not an appropriate unit.

II

THE PETITIONED-FOR UNIT IS NOT AN APPROPRIATE UNIT BECAUSE IT EVISCERATES EMPLOYEES' SECTION 7 RIGHTS BY DEPRIVING THEM OF THE OPPORTUNITY TO FREELY SELECT THEIR BARGAINING REPRESENTATIVE

The Election directed by the Regional Director in a multiemployer unit deprived the individual employees of each of the Designating Contractors of their right to self-determination

regarding unionization. As the Board long ago stated, expressing its preference for single-employer units, "[i]n determining the appropriate unit for election purposes . . . single employer units will normally be appropriate." *Deklewa,* 282 NLRB at 1385. For more than 60 years, the Board has zealously protected the rights of employees from being subordinated to the decisions of multiemployer units. An employer cannot "unilaterally and without the express or implied consent of its employees bind them to representation in a multiemployer unit." *Mohawk Business Machines Corp.,* 116 NLRB 248, 249 (1956) (finding that an employer violated section 8(a)(2) of the Act where it sought to include employees in a multiemployer unit without majority support among those employees). More recently, such protection of employee rights has been reinforced by the Board's repudiation of the "merger doctrine," whereby, for example, "a single employer joins a multiemployer association and adopts that association's collective-bargaining agreement, [and] the single employer's unit 'merges' into the multiemployer unit and the requisite inquiry into majority support occurs in that multiemployer unit." *Deklewa*, 282 NLRB at 1379. This principle was reinforced again more recently in *Comtel Systems Technology, Inc.,* 305 NLRB 287 (1991), where the Board further elaborated, in recognizing the need to protect Section 7 rights, that "the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association." *Id.* at 289 (*quoting Deklewa,* 282 NLRB at 1385 n.42). The Board concluded,

> if a labor organization desires to achieve status as a 9(a) representative of employees of employers in a construction industry multiemployer assocation [*sic*]—and therefore eliminate the potential for 8(f) proviso elections that would test its majority during a contract's term—*it must have the manifest support of a majority of the employees of any individual employer whose employees it seeks to merge into the unit under a 9(a) agreement.*

Id. at 291 (emphasis added). In granting the employer's request for review, reversing the regional director's decision, and reinstating the employer's RM petition, the Board in *Comtel* found that

the union did not have "majority support among the Comtel technicians when the events asserted to create the 9(a) [multiemployer] relationship occurred, so when Comtel filed its RM petition, it was doing so as an employer bound by an 8(f) agreement filing for an election in an appropriate single-employer unit." *Id.* This bedrock principle has been repeatedly followed.[22]

Thus, as would be expected, there is a long history of Board precedent protecting the individual rights of an employer's employees from being subsumed in and subordinated to a multiemployer unit. The Regional Director fails to address this critical issue in the Decision, except in a brief attempt to distinguish *Comtel* with an overly narrow reading, drawing distinctions without any significant difference. Initial Decision at 8. The clear message from the Board in *Comtel*, following years of Board precedent, is that all employees of every employer have the unfettered right under the Act to choose their representative, and not to be forced into an irrevocable 9(a) relationship. *Id.* at 289-91.

Otherwise, for example, a nonunion employer with 40 carpenters will give away its employees' voice on unionization merely by joining a unionized multiemployer association. The impropriety of such a result in the context of Section 7 rights is patently self-evident, and the Board has been careful to protect against such deprivations for many, many years. Here, where the union

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[22] *E.g.*, *C.I.M. Mech. Co.*, 275 NLRB 685, 685 (1985) ("[a]n employer cannot bind its employees to representation in a multiemployer unit without the employees' express or implied consent") (Member Dennis, concurring). In *Casale Indus., Inc.*, 311 NLRB 951 (1993), only after reemphasizing the key points from *Deklewa* and *Comtel* did the Board find a multiemployer unit to be appropriate on facts much more supportive of a multiemployer unit than those in the present case. *Id.* at 952-53. Specifically, in *Casale*, where the parties agreed to hold an election and further agreed that the winner would be recognized by the employers as if the election had been conducted and certified by the NLRB, and where six years had lapsed before the Section 9 recognition was challenged, *id.* at 952, the Board still emphasized *Deklewa* and *Comtel* in distinguishing the situations. In *NLRB v. Local 210, IBT*, 330 F.2d 46 (2d Cir. 1964), the Second Circuit affirmed the Board and explained that "[t]he Board was correct in finding that it was impermissible for the Union to assume the appropriateness of the multi-employer basis. The fact that multi-employer units have been held appropriate in other instances is no assurance that a multi-employer unit would have been held to be appropriate here. *One basic test is whether the multi-employer unit was created with the approval, express or implied, of the employees in each of the constituent single-employer units.*" *Id.* at 47 (emphasis added). Obviously, by definition, the 8(f) multiemployer unit could not have been created with the express or implied approval of the employees because the 8(f) relationship precedes the hiring of any employees.

sentiments of the employees of the Designating Contractors, more than 3,200 in total, have never been determined because the relationships are 8(f) pre-hire, the individual employees of each of the Designating Contractors were preemptively denied their rights under the Act to freely choose a bargaining representative with respect to their own respective individual employers. The likelihood that the Union would not have obtained majority support from most of the employers is not merely idle speculation. With fewer than 25% of the unit voting,[23] it is, of course, mathematically impossible for the Union to have garnered a majority of the votes of the employees of each Designating Contractor. Although a union need only secure a majority of the ballots cast, there is no way of telling whether sufficient ballots were cast in each Designating Contractor unit, and there is, of course, no way of telling whether even among the ballots cast for any Designating Contractor's employees there was a majority vote for unionization. As the cases previously discussed require, the petitioned-for unit cannot stand unless and until the employees at each of the Designating Contractors separately vote to select the Union as their bargaining representative. Accordingly, the Board must reverse the Decision to safeguard the Section 7 rights of all employees of the Designating Contractors and ensure free expression, even if only because the employees of a single Designating Contractor will be precluded from exercising such guaranteed rights under the Act.

[23] Only a small minority of the employees of the Designating Contractors, less than 25% (813/3269) of the total petitioned-for unit, voted in the Election. The overwhelming majority did not vote.

III

THE PETITIONED-FOR UNIT IS NOT AN APPROPRIATE UNIT BECAUSE IT CONTAINS 16 DESIGNATING CONTRACTORS WHO HAVE NOT EMPLOYED ANY EMPLOYEES ELIGIBLE TO VOTE IN THE ELECTION UNDER *DANIEL/STEINY*

Documentary evidence originating from the Carpenter Benefit Funds indisputably proves that 16 Designating Contractors[24] did not employ a single employee eligible to vote in the Election under the *Daniel/Steiny* formula.[25] Tr. 368:9-23.[26] Accordingly, as a matter of law, such Designating Contractors, with no employees, could not enter into anything other than a Section 8(f) pre-hire agreement, *i.e.*, never a Section 9(a) agreement.[27] In the analysis and determination of this issue in the Initial Decision at 9-10, the Regional Director suggested that "because the

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[24] The following 16 Designating Contractors had no employees eligible to vote in the Election: AMBASSADOR CONSTRUCTION CO., INC.; AMETIS INDUSTRIES, INC.; BROAD CONSTRUCTION (REINFORCED); CALVIN MAINTENANCE, INC.; CIROCCO AND OZZIMO, INC.; D'APRILE, INC.; DIAMOND NY CONSTRUCTION SERVICES, INC.; EMPIRE OUTLET BUILDERS, LLC; ENVIROCHROME INTERIORS & DESIGN INC.; FCR CO./FCR CONSTR. SERVICES, LLC; H.C. KRANICHFELD, INC.; J.A. LEE CONSTRUCTION, INC.; MILLENNIUM CONTRACTING SERVICE CORP.; PRECISE MANAGEMENT INC.; SHAW CONTRACTING, LTD.; and TRIDENT INSTALLATIONS, INC.

[25] *See Steiny & Co., Inc.*, 308 NLRB 1323, 1324-26 (1992); *Daniel Constr. Co.*, 133 NLRB 264, 266-67 (1961), *as modified*, 167 NLRB 1078, 1079 (1967). Under the *Daniel/Steiny* criteria, employees who were (1) employed by a Designating Contractor for 30 working days or more within the 12 months preceding the eligibility date for the Election, or (2) had some employment with a Designating Contractor during the 12-month period, and had been employed for 45 working days or more within the 24-month period preceding the eligibility date for the Election, would have been eligible to vote in the Election.

[26] The Carpenter Benefit Funds, in response to a subpoena *duces tecum* served by the BCA, produced approximately 4,000 pages of documents (BCA Ex. 13) (Tr. 232:10-14, 364:12-21) that contained information regarding the hours of work and dates of work for all employees during the *Daniel/Steiny* time period who performed any work for any of the Designating Contractors (as listed in BCA Ex. 3). The BCA performed a thorough analysis of the Carpenter Benefit Funds' production and prepared various lists, requested by the Region, including a Voter Eligibility List (BCA Ex. 14), Challenge List (BCA Ex. 15), and a Welfare Premium List (BCA Ex. 16). Tr. 265:15-366:14. The BCA also prepared a list containing the names of the 16 Designating Contractors who employed no one during the *Daniel/Steiny* period eligible to vote in the Election (BCA Ex. 17) (Tr. 368:5-23), with the information for such list coming exclusively from the Carpenter Benefit Funds' production (BCA. Ex. 13). Tr. 384:23-385:12. However, the Hearing Officer rejected this summary, BCA Ex. 17, as being "beyond the scope of the hearing." Tr. 370:18-20. The rejection of BCA Ex. 17 was erroneous and prejudicial, especially since it appears that the Region never made its own analysis of the Carpenter Benefit Funds' records and has not excluded these 16 Designating Contractors from the 9(a) unit it has found appropriate, even though these 16 employers employ no eligible voters and, therefore, would be precluded from entering into anything other than an 8(f) agreement with the Union.

[27] In *Sunray Ltd.*, 258 NLRB 517 (1981), the Board explained that it "will not enforce a contract covering a single-person unit. Nor will we certify or find appropriate a single-person unit in a representation proceeding." *Id.* at 518. It is axiomatic that a contract will be void and unenforceable, and also unlawful, for an employer with no employees to enter into a Section 9(a) agreement.

[BCA] only looked back six months and not twenty-four months as required by the *Daniel-Steiny* formula, it is possible that those employers will have employees who should be included in the petitioned-for unit." *Id.* at 10. On October 26, 2015, more than two months before the Election and five weeks before the issuance of the Supplemental Decision, the BCA informed the Region (*see* nn.24 & 26, *supra*) that it had now looked back across the full 24 month period and discovered, unequivocally, that 16 of the Designating Contractors employed zero employees eligible to vote in the Election.[28]

As for the Regional Director's concern that "the [BCA] has not produced any evidence to adequately demonstrate that the [16] member employers have definite plans to not employ carpenters in the petitioned-for unit in the future . . ." (Initial Decision at 10), it is important to underscore, again, that the BCA is not, itself, an employer of any carpenters nor, for that matter, does it have knowledge of the operational activities or business plans of its members, including the Designating Contractors. Tr. 46:11-22, 127:17-19. Moreover, the controlling *Daniel-Steiny* formula for voter eligibility in the construction industry looks backward over the two years preceding the initial election eligibility date. It does not call for fortune-telling the future. Plainly, as a practical matter, it is also more than likely, if not obvious, that if 16 of the 145 Designating Contractors have not employed any carpenters for at least two years, they will not be employing any carpenters in the foreseeable future, even if all 16 Designating Contractors intend to continue their work in the construction industry.[29] The Board should reverse the Regional Director's

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[28] Originally, after looking back only six months, the maximum amount of time the BCA could review with the limited reliable and relevant records available to it, the BCA uncovered 49 Designating Contractors who had employed no carpenters. However, once the BCA received the information subpoenaed from the Carpenter Benefit Funds, which enabled it to analyze the entire *Daniel/Steiny* period for all employees of all Designating Contractors, this revealed 16 Designating Contractors employed no employees eligible to vote. That evidence is in BCA Ex. 14, summarized in BCA Ex. 17 (rejected). The Region's refusal to consider this evidence is prejudicial error.

[29] During the Hearing, the Region made no inquiry into the future hiring plans of any of the 16 Designating Contractors. The Decision's belated preoccupation with such facts is as surprising as it is irrelevant. On this record, where there have been two years of no employment of carpenters by the 16 Designating Contractors during a period

Decision, because these 16 Designating Contractors cannot lawfully enter into a Section 9(a) agreement and, therefore, should not be included in a Section 9(a) multiemployer bargaining unit.

IV

THE PETITIONED-FOR UNIT IS NOT AN APPROPRIATE UNIT BECAUSE IT IMPROPERLY INCLUDES SUPERVISORY EMPLOYEES OF THE DESIGNATING CONTRACTORS—CARPENTER FOREMEN AND CARPENTER GENERAL FOREMEN

A. Carpenter General Foremen and Carpenter Foremen: Statutory Supervisors under the Act

In the Supplemental Decision, the Regional Director found that individuals in the Carpenter General Foremen and Carpenter Foremen classifications were not supervisors within the definition of Section 2(11) of the Act.[30] This finding is erroneous and unsupported by record evidence. In reaching this conclusion, the Regional Director incorrectly undervalued the unrebutted testimony of O'Hare and Craig Noller ("Noller"), Director of Member Services of the BCA, both of whom collectively have more than 60 years of experience in the construction industry. Further, the Regional Director dismissed the plain language of the arms-length collective bargaining agreement in which the Union had already acknowledged and agreed that these positions were supervisory.

The burden of proving supervisory status rests on the party asserting it. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). That burden must be met by a preponderance of the evidence. *Id.* The burden of showing something by a preponderance of the evidence, in turn,

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in which no representation issues were raised, there can only be two explanations. Either these Designating Contractors do not perform carpentry work or they subcontract out such work. The Regional Director's suppositions and doubts concerning the 16 Designating Contractors' "definite plans to not employ carpenters" (Initial Decision at 10) is unfounded, speculative, illogical, misplaced, and seemingly result-oriented. It is an attempt to create something out of nothing, and it was incumbent on the Region to explore this further if it believed there were an issue here rather than to speculate based upon nothing. 29 C.F.R. § 102.64 ("... it shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties... .").

[30] 453 employees, or approximately 14% of the unit found appropriate, were identified as holding these positions. BCA Ex. 15.

simply requires evidence that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993). The evidence presented by the BCA is more than sufficient to meet the preponderance standard. That the Regional Director believes the BCA should have introduced more evidence (or more detailed evidence) should not preclude the Board from assigning probative value to the evidence presented, especially where that evidence was not controverted by the Union.[31] Indeed, courts have overturned the Board's denial of supervisory status where the Board disregarded unrebutted testimony and record evidence that contradicted its conclusions. *See, e.g., Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012).

B. O'Hare's and Noller's Industry Experience and Expertise: Supervisory Work and Duties of Foremen in the Field

O'Hare has been the Assistant Managing Director of the BCA for 17 years and has more than 30 years of experience in the construction industry. Tr. 248:16-251:4. In his capacity at the BCA, O'Hare manages the day-to-day operations of the BCA and negotiates, administers and interprets approximately 13[32] different collective bargaining agreements on behalf of the BCA's member-employers. Tr. 244:4-247:19. As a part of his duties, O'Hare visits member job sites several times a week, including two job sites during the week of the October 9 hearing. Tr. 251:15-21. Prior to his work at the BCA, O'Hare worked from 1985 to 1992 for Walter T. Murphy, a

[31] The Supreme Court has "criticized the Board for applying an effective standard different from its announced standard as a breach of its duty to engage in reasoned decisionmaking." *G4S Regulated Sec. Sols., A Div. of G4S Secure Sols. (USA) Inc.*, 362 NLRB No. 134, 6 (June 25, 2015) (Miscimarra, Dissenting) (*citing Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 372-77 (1998)).

[32] Although O'Hare testified there were 14 relationships, a number that varies depending upon the wishes of the BCA membership at any given time, BCA Ex. 6 only identifies 13 unions for whom the BCA can receive, or could at that time have received, bargaining authorization.

general contractor, as a laborer and then as a project manager and estimator. From 1992 to 1998, he worked for Norlander Contracting Corporation, a carpentry drywall contractor, as a project manager and estimator. Tr. 248:16-250:24. During his lengthy career in the construction industry, O'Hare has interacted extensively with carpenters and Carpenter Foremen and Carpenter General Foremen. Tr. 249:7-255:20.

Noller has similar expertise in the construction industry. Until 2014, Noller was employed at Structure Tone, a general contractor. Tr. 294:1-295:16. He began his career in 1984 as a laborer and eventually was promoted to Director of Operations and General Union Foreman, a position he held until he began employment with the BCA in 2014. Tr. 292:10-295:7. In that capacity and during his tenure, Noller oversaw the work of carpenters, including General Foremen and Foremen, working with about 50 carpentry contractors. Tr. 302:7-17. His largest job, at 60 Wall Street, required about 40 Carpenter Foremen (Tr. 296:8-11), including General Foremen in accordance with the requirements of the collective bargaining agreement.[33]

Among other efforts, discussed below, to devalue the evidence presented by the BCA, the Regional Director described the testimony of O'Hare as having "scant relevance to current foreman responsibilities and duties." Supplemental Decision at 7. Plainly, the Regional Director is mischaracterizing the record. In support of its assertions, the Decision cites *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006). That case is clearly distinguishable. In *Avante*, the Board did not place significant value on the testimony of a unit manager of nurses based on her prior experience working as a staff nurse, in part because her testimony contained no reference to a time period or the individuals involved. Here, in contrast, both O'Hare and Noller testified extensively about their experience and specified the time periods and in what capacity they interacted with

[33] In accordance with the collective bargaining agreement, the presence of 40 Foremen would mean there were at least eight General Foremen and 160 carpenters on the site. *See* Argument IV.D., *infra*.

carpenters—Foremen and General Foremen—including giving details concerning several specific jobs on which each worked in their significant careers in the field. Tr. 249:7-255:20, 279:15-18, 296:1-24. Significantly, Noller has recent experience working with carpenters and Foremen and General Foremen—he worked for Structure Tone for 30 years up until 2014. Further, both O'Hare and Noller emphatically testified that the practices of Foremen and General Foremen have not changed since they left field positions with contractors and began working at the BCA (Tr. 251:6-13, 296:16-24)—testimony not present in *Avante*. In *Avante*, there was contested testimony regarding the current authority of the putative supervisors. 348 NLRB at 1057. Here, O'Hare and Noller's testimony is largely uncontested by the only witness presented by the Carpenters, Christopher Wallace ("Wallace"). Based on their experience in the industry, the unrebutted testimony of O'Hare and Noller is more than sufficient evidence of supervisory status of the Foremen and General Foremen.

C. The BCA Presented Sufficient and Reliable Evidence: Foremen and General Foremen are Statutory Supervisors

It is well settled that individuals are statutory supervisors if (1) they hold the authority to engage in any one of the 12 supervisory functions (*e.g.*, "assign" or "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer." *In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Moreover, supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same. *Id.* Accordingly, all that is required of the BCA is to show by a preponderance of the evidence that Foremen and General Foremen engage in only

one of the 12 supervisory functions delineated in the Act.[34] The statutory criteria are read in the disjunctive, and possession of any one of the indicia is sufficient to make an individual a supervisor. *Id.* at 714. Here, the Regional Director erred by failing to find that the preponderance of the evidence established that Foremen and General Foremen exercise the independent authority to hire, fire, assign and transfer work, responsibly direct carpenters, and adjust grievances. Instead, the Regional Director largely ignored unrebutted evidence and testimony and placed an impossible and inequitable burden on the BCA.

D. The Union has Already and Long Ago Agreed: Foremen and General Foremen are Supervisors

In the Parties' collective bargaining agreement (Jt. Ex. 2), the Union acknowledges and agrees that Foremen and General Foremen are the agents of the employer and have the right to hire and discharge employees. The relevant provision reads, in pertinent part, as follows:

> **ARTICLE VI**
>
> **General Foreman – Foreman Hiring Schedule**
>
> **Section 1.** The General Foreman and Foreman shall be the agents of the Employer. The right to hire and discharge employees rests with the General Foreman and/or Foreman who are the authorized representatives of the Employer. . . . .
>
> **Section 2.** When four (4) or more Carpenters are employed, one (1) shall be the foreman. The Employer at its sole discretion, may designate a second foreman, who, shall be from the local Union in which jurisdiction the job is located.
>
> **Section 3.** When five (5) or more Carpenter Foreman are employed, there will be one (1) General Foreman designated by the Employer.

Id., Article VI.

[34] The 12 functions under the Act are the authority to "...hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

In its strained efforts to ignore, devalue and otherwise undercut the plain language of the agreement between the BCA and the Union, the Decision relies heavily on authority involving the limited probative value of so called "paper authority." Supplemental Decision at 6. Those cases are inapposite. Unlike here, where the Union agreed that Foremen and General Foremen are agents of the employer and have the authority to hire and fire (*see* Supplemental Decision at 6), all involve either job descriptions or job titles unilaterally created and controlled by the employer. *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458 (2001); *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2d Cir. 2000); *T.K. Harvin & Sons, Inc.*, 316 NLRB 510 (1995). Although *Avante* did involve a collective bargaining agreement (and a job description), the agreement at issue merely provided that employees could present certain complaints or problems to their immediate supervisor (*Avante,* 348 NLRB at 1060), and did not explicitly recognize that a classification has supervisory status. The collective bargaining agreement here explicitly contains that bargained-for recognition, *i.e.*, an acknowledgment that Foremen and General Foremen have the "right to hire and discharge employees." Jt. Ex. 2, Article VI. Moreover, additional authority relied upon by the Regional Director is similarly misguided. *In re Training School at Vineland*, 332 NLRB 1412 (2000). There, the collective bargaining agreement provided that grievances concerning discipline may be filed in writing with the human resources department after informal discussions with the employee's immediate supervisor—verbiage hardly as concrete as the language here. *Id.* at 1416.

In sum, this is not a case where an employer is using a unilaterally created title or job description to support its position that individuals are supervisors. It is also not the case where an employer is using otherwise unclear language to support its position. This is a case where a collective bargaining agreement negotiated at arms-length contains explicit language reflecting the mutual agreement of the parties that Foremen and General Foremen are agents of the employer

who have supervisory authority. Further, the concern about solely basing supervisory status on "paper authority" does not command an impossibly high evidentiary standard—written documents, when corroborated by unrebutted testimony, are sufficient evidence of supervisory status. *See Lakeland*, 696 F.3d at 1345-49. Logic and common sense dictate that where, as here, a Union has already agreed in many successive contracts that certain individuals are supervisors, and has explicitly set that forth in its collective bargaining agreement, the Regional Director should have given that agreement significant weight in her Decision. Moreover, because the plain language of the agreement is supported by unrebutted testimony, any conclusion that Foremen and General Foremen are not supervisors does violence to the preponderance of the evidence standard.

For many years there has been no dispute regarding the status of Foremen and General Foremen as supervisors. The only thing that has changed is that now the Union has sought certification through a representation election, which would necessarily preclude inclusion of supervisors in the unit under the Act, in contrast to the ability of the Parties to voluntarily include them, as they have for many years, in the unit. The Union's change of position after many years is solely motivated by its attempt to avoid the natural consequence of its seeking certification. That is the sole motivation for the Union's change of view, and it should not be countenanced. The facts have not changed. Only the practical consequences of the Union's representation petition have prompted its change of position. The Union's denial of the status of the Foremen and General Foremen is made out of whole cloth.

E. The Facts in the Field are Dispositive: Foremen and General Foremen Carry Out Duties of Supervisors

1. Foremen and General Foremen Have the Authority to Hire and Fire

The BCA has shown by a preponderance of the evidence that Foremen have the authority to hire and fire. This authority is evident by the plain language of the collective bargaining

agreement, quoted above, and is supported by the testimony of O'Hare and Noller. Significantly, except as it pertains to the "out of work list," no credited testimony contradicts this evidence.

Drawing from his vast knowledge and experience in the construction industry, years supervising Foremen and General Foremen, current weekly visits to job sites and current monthly participation in grievance hearings, O'Hare emphatically testified that Foremen have the authority to hire and fire employees. Tr. 249:24-250:5, 255:13-16. Specifically, he testified that they have the authority to make those decisions *on their own.* Tr. 255:13-16. Contrary to the Regional Director's assertion that O'Hare's testimony lacked specificity and/or that his experience and knowledge were otherwise lacking, O'Hare testified he worked on hundreds of projects while employed at Walter T. Murphy and Norlander. He also testified that he has visited at least a hundred job sites during his tenure in the BCA. Tr. 260:11-261:1. In fact, during the week of the Hearing, O'Hare visited two job sites. The first, a Shugrue project, located at 230 West 8th Street, and the other, a Structure Tone project, located on Madison Avenue and 24th Street. Tr. 261:2-10. Also during the week of the hearing, O'Hare had a conversation with a large carpentry contractor, National Acoustics, in which the contractor told O'Hare that they employed 40 Foremen, who were "paid as foreman and have the responsibilities of foreman." Tr. 279:4-9.

As far as the specific responsibilities of Foremen, O'Hare testified that when a project begins, the Foremen are usually the first people on the job site. Tr. 251:25-252:6. Once there, Foremen read and analyze blueprints, determine where partitions are laid out, order materials, schedule deliveries, coordinate with other trades and use their judgment to decide how many carpenters need to be employed to get the job done. Tr. 251:25-252:17. When Foremen decide how many carpenters to employ on a jobsite, they consult a hiring list and select carpenters from the list to be hired. Tr. 262:6-263:3. This list is created based on the employer's experience with

an employee in the past and on how well they did their job. Tr. 271:7-272:15. Foremen then use independent judgment to decide which individuals to call and then hire them. Tr. 271:7-272:15. O'Hare also testified that when it is necessary to call to find someone on the out of work list, Foremen would make that call.[35] Tr. 272:2-7. While O'Hare has not worked as a project manager for 17 years, he testified, based on his continued exposure to the day to day activities in the industry, that nothing has changed regarding the hiring and firing authority of Foremen. Tr. 251:6-13. Noller, who up until 2014 worked for Structure Tone, agreed. Tr. 296:12-297:2.

It is evident that the testimony of O'Hare regarding the role of Foremen in the hiring process is not merely conclusory, but rather a detailed description of specific facts leading to such a conclusion—a detailed description that is almost entirely uncontested in the record. Indeed, Wallace's testimony does not controvert the foregoing. Wallace did testify that Foremen take action to handle grievances at least 20-25% of the time, but made little reference to the authority of Foremen to hire employees. Tr. 308:8-309:18. Given that O'Hare testified that Foremen decide how many carpenters to hire for a job and which individual carpenters to hire, based on their performance and experience, the Regional Director's assertion that there was "no evidence" that Foremen use any discretion or independent judgment is plainly wrong. *See, e.g., Dickerson-Chapman, Inc. & International Union of Operating Engineers*, 313 NLRB 907, 937-939 (1994) (adopting ALJ decision finding supervisory status where putative supervisor had the authority to select laborers for hire, even where "record fail[ed] to show how many people were hired").

The Regional Director also opined that O'Hare's testimony "suggests" that Foremen need to clear their initial hiring recommendations with a contractor's office. Supplemental Decision at 9. That simply is not true. O'Hare testified that Foremen have the authority to make those

[35] While Wallace testified that in his experience, generally, the contractor's office will make this call, he did state that in the most recent dispatch sheet, at least one foreman did make the call to the out of work list. Tr. 310:10-311:9.

decisions on their own. Tr. 255:13-20. Even if it were the case that Foremen were only making recommendations, the authority to hire includes the authority to make effective recommendations. 29 U.S.C. § 152(11). Indeed, that Foremen would have to clear a hiring decision with a contractor does not deprive Foremen of supervisory status. *Detroit College of Business*, 296 NLRB 318, 319 (1989) (overruling the Regional Director, finding supervisory status where hiring was a "joint decision" based on the recommendation of the putative supervisor); *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (adopting ALJ decision finding supervisory status even where superior interviewed applicants as part of the hiring process and where record evidence did not contain any specific examples of putative supervisor's recommendations).

Foremen also have the authority to fire employees. Tr. 272:19-273:15. However, the Regional Director suggests that there was "no evidence" that Foremen used independent judgment to terminate any employees. Supplemental Decision at 9. That simply is not true. O'Hare testified that when Foremen see that work is slowing down, they make judgements regarding what they need on a day to day (or week to week) basis, including the "level" of employees they need. Tr. 272:19-273:15. In this vein, Foremen give status reports to the contractor but have the authority to make the firing or layoff decisions on their own. Tr. 272:19-273:15. As an illustration, O'Hare testified that if Foremen already have ten men on a job, but only need six, the Foremen would lay four men off. Tr. 273:8-11. Further, in his capacity at the BCA, O'Hare has attended grievance proceedings where Foremen are present to "explain[...] why [they] laid off the individual." Tr. 276:4-8. He attends those grievance hearings once a month. Tr. 284:8-9. At those hearings, O'Hare testified that "it's the carpenter foreman that's there representing the contractor saying why he laid the guy off...that's how I have knowledge of what's going on today." Tr. 258:17-259:5. Wallace's testimony does not contradict O'Hare's statements.

Determining how many carpenters are needed for a job and laying off those that are not needed plainly requires the use of discretion and judgment. *See, e.g.*, *Extreme Building Services Corp. & Local 78, Asbestos Lead & Hazardous Waste Union, Laborers International Union of North America, AFL-CIO*, 349 NLRB 914, 918 (2007) (adopting ALJ decision finding supervisory status where putative supervisor chose which workers to lay off based on job needs, even where superior was involved in lay-off decisions); *Ziniz, Inc.*, 290 NLRB 887, 891 n. 16 (1988) (adopting ALJ decision rejecting argument that carpenter general foreman was not a supervisor in part because the carpenter general foreman was consulted about layoffs and exercised independent judgment in the assignment of work and the direction of work force); *Southern Athletic Co., Inc.*, 157 NLRB 1051, 1060 (1966) (finding supervisory status where putative supervisor made lay off recommendations that were accepted and such recommendations "manifestly required" the use of independent judgment); *Local 307, Teamsters*, 238 NLRB 1450, 1451 (1978) (adopting ALJ decision finding supervisory status where Teamsters foreman was consulted about which employees were laid off and which were kept, based on the foreman's knowledge of "manpower needs" on the job).

2. Foremen Have the Authority to Responsibly Direct

Contrary to the Decision, the authority of Foremen to direct another's work is both "responsible" and requires the use of independent judgment. *Oakwood*, 348 NLRB at 691. In order to show "responsible direction," an employer must present evidence of accountability, that some adverse consequence may befall the one providing the oversight if the tasks are not performed properly. *Id.* Further, if a person has "men under him" and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided the other requirements are met. *Id.* In this case, the Regional Director concluded that there was no evidence

that Foremen or General Foremen are held accountable for their work on the job. Supplemental Decision at 11. That conclusion is squarely contradicted by the record evidence.

Wallace's testimony shows that Foremen are held accountable for their supervisor actions. Tr. 324:5-325:24. He testified that when a company feels that Foremen are not doing a good job, they terminate those individuals (Tr. 324:5-325:24) and that Foremen can be disciplined because of the manner in which they run a job. Tr. 311:15-20. Indeed, Wallace stated that Foremen get terminated "every day" and that it happens for "various reasons," including when the company is "not happy with the job." Tr. 325:10-326:1. Noller's testimony corroborates Wallace. Noller testified that Foremen were responsible for the carpentry work on the job. Tr. 295:17-296:7. Contrary to the Regional Director's assertion otherwise, Wallace's and Noller's testimony show that Foremen are held accountable for the quality of the job. Accordingly, the BCA has shown sufficient evidence that Foremen are responsible for carpenters' performance. *See Lakeland*, 696 F.3d at 1346-1347 (overturning Board's decision where Board ignored evidence that LPNs are held accountable for subordinates' shortcomings).

As for independent judgment in directing work, as described above, Foremen begin a job by laying partitions, ordering materials, scheduling deliveries and coordinating with other trades on the job. Tr. 251:25-252:17. They decide how many employees are needed on the job and when those employees will be employed on the job site. Tr. 252:15-254:1. Foremen participate in weekly meetings where the coordination, progress and quality of the job are discussed with the project manager. Tr. 253:16-254:1. Foremen also coordinate with laborer foremen to clear areas for work in order for the job to progress. Tr. 254:2-14. Similarly, Foremen coordinate with the sheet metal foremen to determine where obstructions are between partitions and the sheet metal work. *Id.* Foremen also make determinations when it comes to coordinating with the electrical

foremen, the steamfitter foremen, and other trades. Tr. 254:15-25. Indeed, as work areas become available, Foremen will "start working a crew in there." Tr. 262:2-5. In sum, as Wallace testified, Foremen run the job. Tr. 326:2-16. Accordingly, because Foremen use independent judgment to direct others' work, they are statutory supervisors. *See Facchina Construction Co., Inc. & Carpenters Regional Council Baltimore & Vicinity a/w United Brotherhood of Carpenters & Joiners of America*, 343 NLRB 886, 893-94 (2004) (adopting ALJ decision finding that despite being provided plans for a job and reporting back to project supervisors, carpenter foremen used independent judgment to responsibly direct employees where they deployed crews on assignments based on crewmember competencies); *Demco New York Corp.*, 337 NLRB 850, 856-57 (2002) (affirming ALJ's conclusion that foremen had the authority to responsibly direct because, *inter alia*, the foremen duties included coordinating with other trades' foremen on the job).

3. Foremen Have the Authority to Assign or Transfer Work

The BCA has also shown that Foremen exercise supervisory authority by assigning and transferring work. O'Hare testified that Foremen decide how many employees they need to complete a project and that Foremen call those employees to get them onto the job. Tr. 262:2-263:3. While the Regional Director is correct that O'Hare testified that the job site conditions "usually," but not always, dictate overtime, it is Foremen, using their judgment, who decide how many and which carpenters will work that overtime. Tr. 263:19-23. While there are discussions between Foremen and contractors regarding overtime, O'Hare testified that Foremen and the front office make those decisions together (Tr. 273:16-274:3), not the front office alone as the Regional Director suggests. Supplemental Decision at 11.

Further, O'Hare testified that when he was a project manager, if an ongoing job required additional carpenters to be hired, Foremen would contact him, recommend additional hires and then, after consulting with him, would make phone calls to hire more individuals. Tr. 272:2-15.

In fact, in O'Hare's experience, when there is an urgent need to move carpenters from one job to another, Foremen determine which carpenters are moved. Tr. 285:8-22. O'Hare's testimony is uncontested. The only thing Wallace's testimony shows regarding the authority to assign or transfer work (in general terms) is that 20-25% of the time when he was dealing with an overtime issue or a starting time issue, he dealt with Foremen.[36] Wallace also testified that carpenters seek approval from Foremen if they want to work through lunch, change their starting hours or, more significantly, if there is an issue with overtime work. Tr. 314:24-317:20.

While the Decision suggests that transferring employees from one assignment to another is "merely equalizing the workload," that characterization supports the BCA's position. Obviously, independent judgement must be exercised in determining the need to make such adjustments, as well as determining how many and whom will be transferred and what jobs they will fulfill. *See, e.g., Potter Electrical Engineering & Construction Co., Inc.*, 181 NLRB 743, 744 (1970) (finding supervisory status based on uncontradicted evidence, *inter alia*, that a foreman used independent judgment to transfer employees from one assignment to another); *Riverside Mills,* 85 NLRB 969, 973 (1949) (finding supervisory status where putative supervisor, based on the demands of work schedules, transferred employees from one job assignment to another); *Winkle Bus Co., Inc. & United Food & Commercial Workers Union, Local 371, AFL-CIO, CLC*, 347 NLRB 1203, n.2 (2006) (finding supervisory status where putative supervisor had authority to transfer drivers from one route to another); *Bills Electric, Inc. & International Brotherhood of Electrical Workers Local Union No. 95*, 350 NLRB 292, 306 (2007) (finding supervisory status where job foreman had the authority to temporarily transfer employees from project to project); *Metropolitan Interpreters & Translators, Inc. & Communications Workers of America, Local*

[36] Wallace testified that when dealing with issues on the job site, including assigning overtime, he would "75, 80 percent of the time...be referred to someone not on the job site." Tr. 308:8-309:3.

9400, AFL-CIO, 21-CA-38356, 2009 WL 330606 (Feb. 5, 2009) (finding supervisory status where putative supervisor's transfer recommendations due to workflow were followed by upper management).

4. Foremen Have the Authority to Adjust Grievances

The BCA has established that Foremen can adjust grievances. Indeed, Foremen play a significant role in the grievance procedure. O'Hare testified that Foremen typically handle the grievances on the job site and Noller testified that when he worked for Structure Tone, in order to resolve a dispute, he would initially speak to Foremen. Tr. 290:17-24, 303:3-15. Wallace's testimony did not contradict this. In fact, contrary to the Regional Director's assertion that Foremen only resolved minor employee complaints, Wallace testified that he resolves issues with Foremen ranging from "very simple" to "a little more complex" to "a little more severe." Tr. 307:5-308:7. While Wallace did testify that when something was below a "certain threshold," a Foremen would handle it, his testimony also shows that at least 20-25% of the time, when the issue was a manning ratio, a layoff or an overtime issue, Foremen would handle it. Tr. 308:8-309:3.

Even assuming, *arguendo*, Wallace's minimization of the Foremen's supervisory responsibilities is accurate, the activities he described are hardly insignificant in the supervisor analysis. Further, the Decision's attempted minimization of the grievance handling responsibilities of Foremen as limited to "step one" (Supplemental Decision at 12) in the process is not only erroneous,[37] but it also ignores the fact that such "first step" authority has been found sufficient to bring individuals within Section 2(11), especially where individuals, as here, are designated as management representatives. *See, e.g., E.I. DuPont Newport Union Local No. 9*, 300 NLRB 1165,

[37] O'Hare testified that the Foremen were present as management's representative at later stages of the grievance procedure with Union representatives in connection with discharge cases. Tr. 244:17-245:1, 263:24-264:1, 287:18-25.

1168 (1990) (adopting ALJ decision finding supervisory status where putative supervisors handled first-step grievances); *Passavant Retirement & Health Center v. N.L.R.B.*, 149 F.3d 243, 248 (3d Cir. 1998) (authority to make minor adjustments in grievances sufficient to support supervisory status). Indeed, according to Wallace, "carpenter foreman [are] the employer's representative on the job site" (Tr. 317:24-318:1), thereby confirming the express language in the collective bargaining agreement. Because there is uncontested testimony that Foremen have the authority to adjust grievances, the Board should find that Foremen are statutory supervisors.

5. Secondary Indicia

The Regional Director largely ignored secondary indicia of supervisory status. Foremen and General Foremen receive, respectively, wage differentials of $3 and $6 above the journeyman scale. Jt. Ex. 2, Article XII, Section 7. Further, Foremen participate in weekly meetings where the coordination, progress and quality of the job are discussed. Tr. 253:16-254:1. The Board has regarded such evidence as persuasive "secondary indicia" of supervisory status. *See, e.g.*, *American River Transportation Co.*, 347 NLRB 925, 927 (2006) (higher pay and better benefits); *Burns Security Services*, 278 NLRB 565, 570 (1986) (putative supervisors attended monthly management meetings). Considered together with the longstanding mutual agreement acknowledging the supervisory status of Foreman and General Foreman, as well as the evidence discussed above regarding hiring, firing, assigning and transferring work, adjusting grievances, and responsibly directing the work of carpenters, the BCA has clearly established by a preponderance of the evidence that Carpenter Foreman and Carpenter General Foreman are supervisors within the meaning of the Act.

CONCLUSION

Based on the above, the BCA respectfully requests that the Board grant its Request for Review in all respects.

Dated: New York, New York
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Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____

Frederick D. Braid
fred.braid@hklaw.com

Howard Sokol
howard.sokol@hklaw.com

Edward Frischling
edward.frischling@hklaw.com

31 West 52nd Street
New York, New York 10019
(212) 513-3200 (phone)
(212) 385-9010 (fax)

Attorneys for Building Contractors, Association, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, the forgoing document, BUILDING CONTRACTORS ASSOCIATION, INC.'S REQUEST FOR REVIEW, was filed in accordance with the National Labor Relations Board's E-Filing Program, and also served by e-mail on the following:

John H. Byington
Archer, Byington, Glennon & Levine, LLP
One Huntington Quadrangle - Suite 4C10
P.O. Box 9064
Melville, New York 11747-9064
jbyington@abgllaw.com

Attorneys for the Petitioner

Karen P. Fernbach
Regional Director
National Labor Relations Board, Region 2
Jacob K. Javits Federal Building
26 Federal Plaza, Room 3614
New York, NY 10278-0105
Karen.Fernbach@nlrb.gov

National Labor Relations Board, Region 2

By: _____
Frederick D. Braid
fred.braid@hklaw.com

31 West 52nd Street
New York, New York 10019
(212) 513-3200 (phone)
(212) 385-9010 (fax)

Attorneys for Building Contractors, Association, Inc.